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No. 00-130

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

ALLEN LUEBBERS,
Superintendent, Potosi Correctional Center
Petitioner,

v.

LEAMON WHITE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF

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CAPITAL CASE

QUESTION PRESENTED FOR REVIEW

Whether a state procedural rule in a collateral proceeding is inherently inadequate to bar review of a federal habeas petition, upon a federal court's conclusion that the state law remedy for post-conviction counsels' noncompliance with a state rule did not allow adequate representation in the collateral proceeding?

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REPLY

The determination by the court below that the state court's remedy for "abandonment" by post-conviction counsel was inadequate necessitated the recognition of a constitutional right to the effective assistance of post-conviction counsel 1

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REPLY

The Court below determined that federal habeas corpus review of respondent's grounds for relief was not precluded by operation of a procedural default, because the procedural rule respondent failed to comply with could not reasonably be anticipated. (See Appendix (hereinafter "App."), at 8). Failure to acknowledge state precedent interpreting the state procedural rule, however, hardly qualifies as a "straightforward application" of this Court's "independent and adequate state grounds" doctrine. Compare Brief in Opposition, at 9.

The Missouri Supreme Court created a very narrow exception to its absolute bar against consideration of an untimely amended post-conviction motion. That exception provides for review of an untimely filed amended motion only when the failure to comply with the time requirements is due exclusively to post-conviction counsel. Sanders v. State, 807 S.W.2d 493 (Mo. 1991) (en banc). While respondent filed an untimely amended post-conviction motion, the Eighth Circuit Court of Appeals failed to acknowledge Sanders, the binding state precedent providing for the very remedy that was afforded respondent. (See App. 8).

Because the Missouri Supreme Court has never allowed consideration of an untimely filed second post-conviction motion, the decision of the court below necessitated a recognition of a constitutional right to the effective assistance of counsel in a collateral proceeding. The Eighth Circuit's pronouncement of parent-like dissatisfaction with the state court's narrow remedy makes this clear: "We cannot see why such an abandonment, forcing Mr. White's second attorney to prepare and write a motion in fourteen days, would not include *the content* of the motion." (App. 8) (emphasis added).

By applying a federal rule of some standard of attorney competency to a post-conviction proceeding, the decision of the court below nullifies Pennsylvania v. Finley, 481 U.S. 551 (1987), Coleman v. Thompson, 501 U.S. 722 (1991), and 28 U.S.C. § 2254(i), and conflicts with every circuit court of appeals that has held that there is not a constitutional right to post-conviction counsel. The circumstances of this case warrant the Court's grant of certiorari.

Conclusion

WHEREFORE, Superintendent Luebbers prays the Court for its order issuing a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

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